ORIGINAL

Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C.

In the Matter of

Implementation of
Video Description of
Video Programming

MM Docket No. 99-339

PETITION FOR RECONSIDERATION

OF THE

MOTION PICTURE ASSOCIATION OF AMERICA, INC.

James J. Popham
Vice President and Statutory License Counsel
Motion Picture Association of America, Inc.
1600 Eye Street, N.W.
Washington, D.C. 20006
(202) 293-1966
(202) 785-3026 (facsimile)

October 11, 2000

Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C.

In the Matter of

MM Docket No. 99-339

Implementation of
Video Description of
Video Programming

PETITION FOR RECONSIDERATION OF THE MOTION PICTURE ASSOCIATION OF AMERICA, INC.

In 1996, Congress directed the Commission to commence an inquiry on video description and report its findings to Congress.[1] Congress at that time actively considered, but ultimately decided against authorizing the Commission to adopt video description requirements. Nonetheless, after completing its inquiry, the Commission commenced a rulemaking proceeding and adopted video description rules.[2] Thus, the Commission left behind the *terra firma* of an explicit statutory mandate and set a course into the sea of judicial skepticism.[3] There, without benefit of explicit statutory

---

[1] 47 U.S.C. §613(f).

[2] *Report and Order*, MM Docket No. 99-339, FCC 00-258 (released August 7, 2000), 65 *Fed. Reg.* 54805 (September 11, 2000) [hereinafter cited as *Report and Order*].

[3] *Report and Order*, Separate Statement of Commissioner Michael K. Powell, Concurring in Part and Dissenting in Part, at 5 [hereinafter cited as "Powell Statement"].

authority for its action, the Commission futilely will seek to keep its head above water by clinging to the deflated remains of a general statutory mandate punctured by Congress's outright refusal to confer such authority on the Commission. Ultimately, lacking the buoyancy offered by a sound legal basis, the new rules will founder.

The Motion Picture Association of America, Inc. ("MPAA"), therefore, urges the Commission to reconsider and rescind adoption of its new video description rules.[4] As eminently laudable as the Commission's goals are – and as much as MPAA embraces the same desire to assist the vision-impaired enjoy television entertainment to the fullest[5] –, the Commission's rules are destined to provoke judicial rebuke. The Commission cavalierly brushed off Congress and the broad array of commenting parties who warned the Commission that sailing beyond the course defined by Congress would shipwreck the Commission's action. Now, that shipwreck is imminent. Therefore, MPAA urges the Commission to trim its sails, right its course, and reconsider its ill-advised adoption of video description rules.

1. The Commission Has Exceeded Its Authority in Adopting Video Description Rules.

In simplest terms, Congress defined the course the Commission was to follow, but the Commission chose to go in a different direction. The Commission has strained

---

[4] MPAA is an organization comprised of the major producers and distributors of motion pictures and television programs in the United States. MPAA filed comments and reply comments in this proceeding urging the Commission to refrain from adopting mandatory video description rules.

[5] *See* Powell Statement at 9.

to justify this departure from Congress's mandate, but its position defies both law and logic. In essence, the Commission completely discounts its instructions from Congress. It acts instead as if Congress had never spoken to the issue, much less given the Commission a clear directive. It acts as if its broad grant of rulemaking authority in the Communications Act were the only pertinent statutory mandate. It acts as if it had plenary authority subject only to explicit limitations. As observed by the two dissenting Commissioners, this approach to jurisdiction is "clearly erroneous" and "turns the notion of delegated authority on its head."[6]

The Commission strays from its proper course in relying on its broader authority under the Act, while placing Section 713(f) on the shelf in a well-insulated container. The Commission may well in some circumstances assert authority under a theory of ancillary jurisdiction, but that authority is limited.[7] First, where Congress already has granted the Commission specific statutory authority, the Commission's jurisdiction is defined. Any form of "ancillary jurisdiction" would be superfluous and disdainful of the explicit statutory mandate. Indeed, the theory of "ancillary jurisdiction" gained the Court's approval in a circumstance where Congress had remained conspicuously mute – regulation of cable television.[8] Thus, the theory of ancillary jurisdiction has no place in matters where Congress has delineated the

---

[6] *Report and Order*, Statement of Commissioner Harold W. Furchtgott-Roth, Concurring in Part and Dissenting in Part, at 2 [hereinafter cited as Furchtgott-Roth Statement]; Powell Statement at 3.

[7] *United States v. Midwest Video Corp.*, 406 U.S. 649 (1972).

[8] *United States v. Southwestern Cable, Inc.*, 392 U.S. 157, 178 (1968).

Commission's authority and directed a particular course of action. Although the Commission trumpets the judicial approval of its creation of the Universal Service Fund in attempting to justify its assertion of authority to adopt video description rules, it ignores this critical limitation.[9] There, again, Congress had been silent on the issue. Therefore, the notion of ancillary jurisdiction is unavailing to the Commission's assertion of authority to adopt video description rules.

Second, even if the theory of ancillary jurisdiction offered some basis for assertions of authority in circumstances where Congress had addressed an issue, it hardly may be interpreted to support the Commission's assertion of authority to adopt video description rules. Ancillary jurisdiction is eclipsed when Congress later defines the Commission's authority and directs a particular course of Commission action. Congress gave the Commission a very clear – and very limited – mandate in Section 713(f). The Commission was to conduct an inquiry and prepare a report, nothing more. Moreover, the legislative history of Section 713(f) leaves no doubt that Congress flatly rejected granting the Commission authority to adopt video description rules.[10] Indeed, logic compels the conclusion that Congress reserved to itself the power to consider additional action. Congress wanted the report so it could assess the need for further action. Why have the Commission gather information and prepare a report to Congress if Congress intended for the Commission to take additional action?

---

[9] *Report and Order* at ¶¶53-56.

[10] *See* Powell Statement at 3-5; Furchtgott-Roth Statement at 1-2.

Finally, Congress easily might have authorized the Commission to adopt rules, as it had regarding closed-captioning, but it did not. Therefore, if anything, Congress's directive to the Commission in Section 713(f) forecloses any assertion of ancillary jurisdiction as authority for adoption of vide description rules.

Third, the Commission's contention that its jurisdiction, ancillary or otherwise, is circumscribed only by an express statutory prohibition is too convenient.[11] Because the Commission was confronting a clear and limited grant of authority, it was faced with circumnavigating the lawful and logical interpretation of Section 713(f). Its approach was to develop a theory of virtual plenary jurisdiction defined not by a grant of authority, but by specific, explicit limits on that authority. The law permits no such feat of circumnavigation. The proper issue never is whether jurisdiction has been withheld. The proper issue is whether authority has been granted in the first place.[12] Furthermore, the Commission's "negative option" theory of jurisdiction is utterly impractical. As Commissioner Powell so rightly observes, Congress "did not obligate itself in the future to the Herculean task of specifically prohibiting any possible action by the Commission when it crafts new laws in any area with the scope of section 1."[13] Here, again, Congress ought have been able to expect the Commission to follow its clear and specific directive without getting carried away. It should have been able to rely on the Commission to follow its instructions, report to Congress, and await

---

[11] *Report and Order* at ¶¶ 58-60.

[12] *Brown & Williamson Tobacco Corp. v. FDA*, 153 F 3d 155, 161 (4th Cir. 1998).

[13] Powell Statement at 3.

further action. In no way should it have been required to proscribe every other conceivable course the Commission might consider on its own. Therefore, the Commission's appreciation of its statutory authority is strained and ultimately incredible.

The Commission, therefore, must reef its sails and return to port. Its action adopting new video description rules exceeds the authority granted it by Congress in Section 713(f) or by any valid theory of ancillary jurisdiction.

2. The Commission understates the extent to which its new video description rules are content-based.

The Commission describes the new video description rules as content-neutral.[14] This attempt to downplay the First Amendment and copyright implications of the rules is dubious at best. Nothing the Commission says can obscure the fact that *new content* must be *created* and *added* to an existing program. Indeed, the Commission itself acknowledges that the initial phase of video description is "writing a script to describe key visual elements."[15] This script is content. The addition of that content to the program is compelled speech. Furthermore, it is a compelled new creation and a compelled modification of a creative work.[16] That script is no less a creative work subject to independent copyright protection than the original script of

---

[14] *Report and Order* at ¶64.

[15] *Report and Order* at ¶11.

[16] Comments of MPAA, MM Docket No 99-339 (filed February 23, 2000) at 14.

the program, the film or tape of the program, the music in the program, or any other works in the program that enjoy copyright protection.

The Commission's effort to explain this away is ineffectual. First, the suggestion that "a mandate to provide video description does not require a programmer to express anything other than what the programmer has already chosen to express in the visual elements of a program" is myopic.[17] In the copyright milieu in particular, where the protected element is expression, requiring no more than a different expression of the same substance strikes at the heart of the creative expression embodied in the program.[18] Second, the Commission finds the video description content as comparable to translating from one language to another or adding closed captions to a program.[19] Neither is remotely comparable to inserting entirely new creative content into a program. Yet, the new rule requires no less.

In sum, the Commission either failed to appreciate or brazenly discounted the First Amendment and copyright-related infirmities of the video description rules. In either event, reconsideration and repeal of the new rules are essential to the Commission's remaining within the boundaries of its authority set by the First Amendment and Copyright Act.

---

[17] *Report and Order* at ¶163.

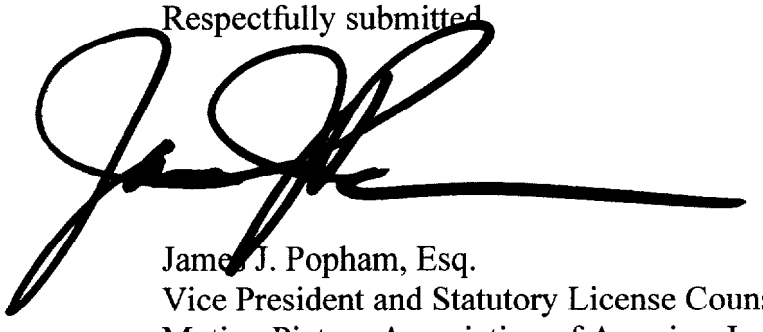
[18] Even this analysis sidesteps the questions that would arise if program creators – faced with a video description requirement – began writing dialogue and setting and editing scenes so as to accommodate the insertion of video descriptions.

[19] *Report and Order* at ¶63.

Conclusion

MPAA's complaint with the rules is rooted in preserving the well-established boundaries on the Commission's authority – as well as the strictures of the First Amendment on content requirements and the integrity of this country's system of copyright protection. None of this involves slighting the needs of the vision-impaired or ignoring the desire of the motion picture industry to respond to those needs through voluntary actions. As well intended as the Commission may have been, numerous questions exist about the legality of the Commission's new video description rules. The points raised herein by MPAA alone demand reconsideration and retraction of the rules. Therefore, MPAA urges the Commission to heed its concerns and reverse its course before the new video description rules founder on the shores of judicial rebuke.

Respectfully submitted,



James J. Popham, Esq.
Vice President and Statutory License Counsel
Motion Picture Association of America, Inc.
1600 Eye Street, N.W.
Washington, D.C. 20006
(202) 293-1966
(202) 785-3026 (facsimile)

October 11, 2000